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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 7[redacted]B 173

PACIFIC MAIL STEAMSHIP COMPANY, a corporation, (Respondent, Claimant and Cross-Libelant),

STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel,

Cross-Petitioners and Respondents,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. PATTERSON, deceased, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON (Libelants and Cross-Respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN McDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND (Libelants),

Cross-Respondents and Petitioners.

Cross Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit
and
Brief in Support Thereof.

EDWARD J. McCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Counsel for Cross-Petitioners.

Parker Printing Company, 532 Clay Street, San Francisco

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An intermediate servant or middleman is not liable for the negligent acts of a servant under him.

The parties who *are* liable for such negligence are: first, the inferior servant because of his personal negligence; second, the owner or principal because the work in course of which the negligence was committed was being done for his benefit 11

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In the Supreme Court
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OCTOBER TERM, 1926

No. 744

PACIFIC MAIL STEAMSHIP COMPANY, a corporation, (Respondent, Claimant and Cross-Libelant),

STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel,

Cross-Petitioners and Respondents,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. PATTERSON, deceased, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON (Libelants and Cross-Respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN MCDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND (Libelants),

Cross-Respondents and Petitioners.

Cross Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your cross-petitioners, George (J.) McKinnon, master of the steamship Newport and Pacific Mail Steamship Company, owner of said steamship, respectfully represent to this Honorable Court as follows:

This cause is already before this court. Application of respondents, Henry Wilson, et al., for writ of certiorari was granted January 10, 1927. That application sought a review of that part of the decision of the Circuit Court of Appeals which held that the collision of the steamships Newport and Svea was due to the mutual fault of these vessels. The decision of the Circuit Court of Appeals also adjudged that your cross-petitioner, Captain McKinnon of the Newport, was properly held liable for the negligence of a subordinate officer. Inasmuch as the case is now to be reviewed on the merits in respect to the mutual fault issue, *your cross-petitioners respectfully ask that the issue of the individual liability of the master for the negligence of a subordinate be reviewed also.*

As admiralty cases in this court are trials *de novo*

Yeaton and others v. United States, 5 Cranch. 281;
Watts, Watts & Co., Ltd., v. Unione Austriaca di Navigazione, 248 U. S. 9;
Standard Oil Co. of New Jersey v. Southern Pacific Co. et al., 268 U. S. 146,

the entire cause is probably now before this court through the granting of the original petition for certiorari; but to

avoid any question in this regard cross-petitioners are, in view of the opinions of this court in

Federal Trade Commission v. Pacific States Paper Trade Assn., et al., #71 October Term, 1926; Decided January 3, 1927, and

Hubbard v. Tod, 171 U. S. 474, 494,

taking the liberty of filing this cross petition for certiorari.

As the original petitioners have already represented, and cross-petitioners now represent, this case of *Henry Wilson et al., v. Pacific Mail Steamship Company et al.*, No. 4902, recently decided by the United States Circuit Court of Appeals for the Ninth Circuit, affirming in part and reversing in part the judgment of the Southern Division of the United States District Court for the Southern District of California is an admiralty case in which the judgment of said Circuit Court of Appeals is made final by the provisions of the Judicial Code. This court has already required by its writ of certiorari issued in response to the original application that the cause be certified to it for review and determination, and your cross-petitioners now respectfully ask that the entire case be reviewed and determined including specifically the issue of the liability of the master of a vessel for negligence in her operation, even though he be not personally negligent.

It is submitted that this last named point involves an important question of federal law which has not been, but should be, settled by this court. The decision of the Circuit Court of Appeals in this regard is that the master of a vessel, although not personally negligent, is liable in

tort for the negligent act of subordinate officers and members of the crew to the same extent as the owners of the vessel.

It is submitted that this judgment against the master establishes a rule of liability without fault, which is in contravention of the settled principles of the general doctrine of *respondeat superior;* that, if in ancient times there was a real basis for such imposition of liability on the master of a vessel regardless of personal negligence, the basis has long since vanished; that the judgment under modern conditions of ship operation is harsh, unreasonable and unjust, particularly as such liability if imposed upon the master is greater even than that of the ship owner inasmuch as the latter has the benefit of the Harter Act* and the limited liability statutes** and the ship master has not.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This cross petition involves the question whether the master of a vessel who is not personally negligent, may be held personally liable in tort for the negligent acts of his subordinates.

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*Act of Feb. 13, 1893, Ch. 105, Sec. 3, 27 Stat. at L. 445, U. S. Comp. Stat. Ann. 1916, Sec. 8031.

**R. S. 4283-4289, 9 Stat. at L. 635, R. S. 4289, 24 Stat. at L. 80, Act of June 26, 1884, C. 121, par. 18, 23 Stat. at L. 57 (U. S. Comp. Stat. Ann. 1916, Secs. 8021-8028).

This litigation arose out of a collision between the steamship Newport and the schooner Svea off the coast of California, November 29, 1922. The Svea interests libeled and the Newport interests cross-libeled. The former joined your cross-petitioner, the master of the Newport, as party respondent. The Newport pleadings, although admitting fault, specifically denied the master's personal participation therein (30)* and also charged the Svea with being in fault for the collision mutually with the Newport.

The District Judge held the Newport solely at fault and entered a decree against the Newport, her owner, Pacific Mail Steamship Company and also against your cross-petitioner, the master of the Newport (55). In the opinion of the District Judge (63) the question of the master's liability was not discussed, nor was there any finding that he was personally negligent.

The evidence is that he was not. The morning of the collision was bright and sunny; the sea calm and the wind negligible. No other vessels were in sight. Captain McKinnon had left the third officer in charge of the bridge and had gone below to his cabin (121) some twenty minutes before the collision (105). He was below in the lavatory when he first heard the whistle of the Svea (122). He got up and looked out the port and saw the Svea heading for the Newport (121), about 600 feet away (105, 122). He rushed to the bridge (122), but was too late to do anything to avert the collision.

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*Numbers in parentheses without other designation refer to pages of the Record.

Appeal (221) was taken from the decree of the District Court (55) adjudging the master of the Newport individually liable and error was duly assigned (217, Assignment xiii). Accepting it that the evidence excused the master from personal negligence the Circuit Court of Appeals felt impelled on the authority of certain State and District Court cases and text writers, to affirm the judgment (15 Fed. 2nd 342); though regretting it seems to us this necessity.

Referring to the argument that, if there ever had been reason for imposing such personal liability on a shipmaster, it had long ceased to exist, the Circuit Court of Appeals said:

> "There is force in the reasoning, but it does not seem to have been sufficiently cogent to persuade text writers and courts to break the more ancient and stricter doctrine of the maritime law."

CONCLUSION.

The cross petition should be granted for the following reasons:

1—The rule that a shipmaster, although free from fault, is liable in tort for the negligent acts of his subordinates is harsh, unreasonable and unjust.

2—The judgment conflicts with the established principles of the law of *respondeat superior*.

3—While there are admittedly certain State and District Court and text authorities holding that a shipmaster, free

from fault, is liable in tort for the acts of his subordinates there is also authority *contra* and the doctrine is not settled law.

4—Even assuming that there once were valid reasons for imposing such liability on a shipmaster, these reasons have long since vanished and do not exist under modern conditions of ship operation.

"Cessante ratione legis cessat ipsa lex."

5—The determination of the liability of a shipmaster under these conditions is a federal question of great importance to ship owners, operators and masters. *The question has never been passed upon by this court.*

WHEREFORE, your cross-petitioners respectfully pray that this cross petition for writ of certiorari be granted and that on hearing of the certiorari granted Henry Wilson et al., hereinabove referred to, this Honorable Court be pleased to review the question herein presented, whether cross-petitioner McKinnon was properly held liable for the negligence of the third officer of his vessel.

Dated: San Francisco, California,
January 22, 1927.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Counsel for Cross-Petitioners.

State of California,
City and County of San Francisco. } ss.

FARNHAM P. GRIFFITHS, of lawful age, being first duly sworn, deposes and says:

That he is one of the attorneys for cross-petitioners in the above entitled cause; that he prepared the foregoing cross petition and that the allegations thereof are true as he verily believes.

FARNHAM P. GRIFFITHS.

Subscribed and sworn to before me this 22nd day of January, 1927.

(Seal) FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires November 22, 1929.

In the Supreme Court
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United States

OCTOBER TERM, 1926

No. 744

PACIFIC MAIL STEAMSHIP COMPANY, a corporation, (Respondent, Claimant and Cross-Libelant),

STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel,

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Cross-Respondents and Petitioners.

Brief in Support of Cross Petition.

STATEMENT OF THE CASE.

This brief is submitted in support of the cross petition for writ of certiorari for a review of that part of the decision of the Circuit Court of Appeals (15 Fed. 2nd 342; Record 239) affirming the judgment and decree of the District Court holding Captain McKinnon, Master of the steamship Newport, individually liable for the collision in question. The decree of the District Court will be found at page 55 of the Record. The opinion of the District Court does not deal with the above point. This opinion will be found at page 63 of the Record and is reported in 2 Fed. (2nd) 255.

We refer, for further statement of the case, to the "summary and short statement of the matter involved" in the preceding cross petition.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in deciding that Captain McKinnon was properly held liable for the negligence of the third officer of the Newport.

ARGUMENT.

I. The judgment conflicts with the established principles of the law of *respondeat superior.*

An intermediate servant or middleman is not liable for the negligent acts of a servant under him.

The parties who *are* liable for such negligence are: first, the inferior servant because of his personal negligence; second, the owner or principal because the work in course of which the negligence was committed was being done for his benefit.

II. Although there are certain State and District Court decisions and texts to the effect that a shipmaster *is* liable (irrespective of personal negligence) for the negligence of servants under him, there is also contrary authority.

We do not think it is settled law, even in the lower courts, that the tort liability of a shipmaster is different from that of any other intermediate servant. *This court has not passed on the question.*

III. Granting that the rule was once that a shipmaster is liable for the negligent acts of his subordinates, the reason for such harsh doctrine has ceased to exist and the rule should no longer be applied. *Cessante ratione legis, cessat ipsa lex.*

I.

THE JUDGMENT CONFLICTS WITH THE ESTABLISHED PRINCIPLES OF THE LAW OF RESPONDEAT SUPERIOR.

An intermediate servant is not liable for the torts of subordinates in the absence of personal negligence.

We deem it to be settled law that an intermediate servant (or as he is sometimes denominated, intermediate

superior employee or middle man or superior or intermediate agent or superior servant) is not liable for the negligent acts of a servant under him. The two parties who *are* liable for such negligence are:

First: The inferior servant because of his personal negligence;

Second: The owner or principal under the doctrine of *respondeat superior* because the work in course of which the negligence was committed was being done for his benefit.

The intermediate servant in the absence of personal negligence, is not held.

This rule is so well settled that we merely refer in passing to the leading case:

Stone & Cartwright, 6 Term. Rep. (Durn & East 411); 101 Eng. Reprint Reports 622,

where Lord Kenyon said:

> "In all these cases I have ever understood that the action must either be brought against the hand committing the injury, or against the owner for whom the act was done: but it was never heard of that a servant who hires laborers for his master was answerable for all their acts."

and to

Brown & Sons Lumber Company v. Sessler, 128 Tenn. 665, 163 S. W. 812;

American Annotated Cases, 1915 C, 103 and cases cited;

Mechem - Agency, 2nd Ed. Sec. 1643.

Under the general and well established rule, therefore, judgment (in absence of personal negligence) would not lie against the master of the Newport. To sustain the judgment against him in this case it must be found that the case of a shipmaster is an exception to this general rule. Is it?

II.

ALTHOUGH THERE ARE CERTAIN STATE AND DISTRICT COURT DECISIONS AND TEXTS TO THE EFFECT THAT A SHIPMASTER IS LIABLE FOR THE NEGLIGENCE OF SUBORDINATE SERVANTS, WE DO NOT THINK IT IS SETTLED LAW THAT HIS LIABILITY IS DIFFERENT FROM THAT OF ANY OTHER INTERMEDIATE SERVANT. THERE IS AUTHORITY THAT IT IS NOT. THIS COURT HAS NOT PASSED ON THE QUESTION.

The question of the liability in tort of a master of a vessel free from personal fault has been rarely passed on; never, so far as we are able to ascertain, in recent years (until this case). But there is authority which holds that the case of a shipmaster is an exception to the general rule of non-liability of an intermediate servant for torts of subordinates. We have found but six cases which have definitely held the master liable.* Three of these are de-

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**Wilson v. Belvidere*, 30 Fed. Cas. 106, No. 17,790 (D. C. Pa. 1806) cited by the Circuit Court of Appeals, if good law, does not seem to us to be in point. It apparently holds that the entire personnel of the vessel must contribute, by deduction from and in proportion to, their monthly wages to make up for cargo lost by the negligence of any of them—except that those who remonstrate in advance against the negligence will not be thus required to contribute. There is no suggestion in the case of the right of any third party damaged by such negligence to sue non-negligent members of the ship's complement, nor is there any suggestion that each member of the ship's personnel may have a judgment rendered against him for the

cisions of New York State Courts; one is a Federal District Court case; and two are Louisiana cases which seem to us to be overruled. The six cases are

Denison v. Seymour, 9 Wend. 9, 11 N. Y. (C. L.) 515 (1832);

Foot v. Wiswall, 14 Johns, 304 (1817);

Kennedy v. Ryall, 67 N. Y. 379 (1876);

The City of New York, 25 Fed. 149 (1885);

Buel v. New York Steamer, 17 La. Rep. 541 (1841);

Daret v. Gray, 12 La. Ann. 394 (1857).

There are also several text writers who lay down the same exception to the general rule, notably *Story on Agency*.

We think it may be properly said that *Denison v. Seymour* is the leading case and *Story on Agency* the leading text recognizing the exception.

It is submitted that the reasoning of *Denison v. Seymour*, is unsound. It is:

The master of a merchant vessel serves voluntarily; he may choose his own officers. If the owners insist on incompetent officers the master is at liberty to leave the service; therefore, having voluntarily taken the ship and approved of his subordinates, he is responsible for their negligence.

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entire loss. The language quoted by the Circuit Court of Appeals in the case at bar should be read in context with the opinion in the *Belvedere* case. So read the above mentioned distinctions appear at once and it also becomes plain that the Pennsylvania District Court was not dealing with the question of the master's contributory liability alone but of the contributory obligation of the entire personnel of the ship, master, officers and crew included.

The result, we respectfully suggest, is a *non-sequitur*. It may be that the master should be responsible if he negligently employs or negligently approves the employment of incompetent subordinates; but there is no sound reason why he should be responsible for the negligent acts of a licensed officer not known to him to be incompetent.

Denison v. Seymour cites for its holding

Bowcher v. Noidstrom, 1 Taunt. 568; 127 Eng. Rep. 954,

and

Foot v. Wiswall, 14 Johns, 304.

The *Denison* opinion says that in *Bowcher v. Noidstrom*

> "*it seemed* to be taken for granted that the captain was liable, and the court *seemed* to acknowledge the principle that the master was liable for the conduct of a pilot on board his vessel; but that was an action of trespass, and the captain had done no act. They directed a non-suit." (The italicizing is ours.)

Reference to *Bowcher v. Noidstrom*, decided in 1809, shows that it is far from definite authority that the ship master is liable for the negligent acts of his inferior officers, and of this case Lord Justice Best said in *Hall v. Smith*, 2 Bing. 156; 130 Eng. Rep. 265:

> "In Bowcher v. Noidstrom (1 Taunt. 568) Lawrence, J. mentions the case of the captain of the 'Russell' man of war who was held answerable for the act of one of the lieutenants, who had command of the watch, in running down an Indiaman, whilst the captain was asleep in his cabin. When or by whom that case was decided I do not know; but it is

> supported by no other decision that I am aware of, and its authority is shaken by the judgment of the case in which it is cited."

Foot v. Wiswall, the other authority cited to the point in the *Denison* case contains no discussion of the question.

Story on Agency, 7th Ed., Sec. 313, recognizes the general rule that the middle man is not liable for the tortious acts of an under servant. In Section 314 the learned author states that the case of a shipmaster is an important exception to this general rule. In Section 315 it is stated that this exception to the general rule is adopted in the maritime jurisprudence of the modern commercial nations of continental Europe, it having been derived from the same common source—the Roman Law. And in text and footnote the writer refers to the Digest of Justinian and other ancient texts. Mr. Justice Story predicates this exceptional liability of the master principally on the ground that masters of ships, though the agents or servants of the shipowners, are treated "as in some sort a subrogated principal and qualified owner of the ship, possessing authority in the nature of the exercitorial power for the time being". In Chapter III of this brief (p. 21 infra) we present the considerations which show we think that *Story's* exception is predicated on conditions no longer existent and that his premise accordingly fails. *Story* also says that the imposition of this personal liability on the master will tend to induce a superior watchfulness over the conduct of his subordinates; but that could be said of any middleman. *Story* relies on *Denison v. Seymour* and quotes extensively in a footnote

from the opinion in that case; but as we have already suggested the decision in that case is a *non-sequitur* from the reasoning.

With *Story's* exception based on conditions no longer existent and *Denison v. Seymour* based on a *non-sequitur* and the other cases listed above based on either *Story* or *Denison v. Seymour* or simply announcing the rule without reasoning or authority, we submit that there is no longer, if there ever was, an exception in the case of shipmasters to the established rule that the intermediate agent is not liable for negligent acts of subordinates. That the other cases listed above are based either on *Story* or *Denison v. Seymour* or announce the rule without reasoning or authority will be seen from a review of them.

Foot v. Wiswall is in the last category. *Kennedy v. Ryall* relies on *Denison v. Seymour* and *Story*. The first Louisiana case, *Buel v. N. Y. Steamer* relies on *Story* and on *Burke v. Clarke*, 11 La. Rep. 206. This latter case is not in point. It held that a master who was part owner was jointly and severally liable with his partner. *The City of New York*, 25 Fed. 149 (1885) is based on *Story* and apparently on that basis alone gives it as the general rule in English and American law that the master is liable for the tortious acts of his subordinates.

Examination of other texts which recognize the exception to the general rule.

Shearman & Redfield on Negligence, 6 Ed. Vol. 2, Sec. 246, p. 712;

36 *Cyc.* 150;

11 *C. J.* 1172.

Spencer on Collisions, Sec. 182;

Kay on Shipmasters and Seamen, Vol. 2, p. 1153,

discloses that they are substantially based on *Story* or the other authorities we have reviewed, or on other old cases which are not in point. For instance, *Spencer* cites only *The Lotty,* 15 Fed. Cas. No. 8524 (1846) in his support. In that case the master was personally negligent, in suffering his vessel to remain inadequately moored in the face of an approaching and increasing storm of which he had ample warning.

It does not seem to us that it can reasonably be said that this alleged exception to the general rule has been generally accepted in this country and England. The two Louisiana cases above referred to are overruled, we think, by the case of

Le Blanc v. Sweet, 31 So. 766 (La.).

In this case the Supreme Court of Louisiana held that

> "Where an action in damages is brought against the owner and also the master of a steamboat, and it appears that in the transaction out of which the action arose the master was acting in his representative capacity, the owner alone is liable." (Syllabus by the Court.)

In the body of the opinion it is stated:

> "As to the defendants, it appears that the boat belonged to Daniel E. Sweet, and that Henry L. Sweet occupied the position of master and engineer. Under these circumstances, we find no reason for holding the latter liable."

The case was one where a passenger was drowned in disembarking from a vessel, owing to the negligence of

the ship's officers, in which the master had no part.

See also

De Harde v. Magdalena, 24 La. Ann. 267.

The law of England is assuredly contrary. We have already adverted to the criticism of *Bowcher v. Noidstrom* by Lord Justice Best in *Hall v. Smith,* 2 Bing. 156 (p. 15, supra).

In Volume 26 of *Halsbury's Laws of England* at page 526, Section 771, on the liability of the master in the chapter on collision, reads:

> "The master is liable for damage arising from his own negligence or breach of contract made with the owner of cargo shipped on his vessel; but he is not liable for the damage done by an act of the crew or of the pilot, whether done in the course of their duty to the shipowner or not, unless ordered by him."

In the chapter on Liability for Collisions, the 8th Edition of *Marsden on Collisions at Sea,* page 73, opens with the following passage, citing in footnotes with obvious disapproval *Story* and *Denison v. Seymour,* supra:

> "The person primarily liable in damages to the sufferer by collision is he by whose negligent act the loss was occasioned. The shipowner navigating his own vessel, the master, mate, pilot or other person in charge of the ship, who gave a wrong order to the helm, the helmsman who directed the ship's course wrongly, the seaman on the lookout who negligently failed to see and report the approach of the other vessel, may all be sued as wrongdoers, and are liable for damages.
>
> Thus when an action was brought against a pilot on board a King's ship for injury to the plaintiff's ship by the King's ship, it was held by Lord Ken-

yon that, though the pilot might be obliged to act in obedience to the order of the lieutenant in command of the King's ship, yet the pilot would be liable, if the collision happened by his personal misconduct. Upon proof, however, that the collision occurred by reason of an alteration of the helm ordered by the lieutenant, the plaintiff was non-suited.

It has been said that the master is liable for the negligent and wrongful acts of his crew as well as for his own acts. His liability as carrier, unless specially limited, may extend so far,* but in no reported case has he been held liable in tort for wrongful acts of the crew. For wilful injury to another ship by pilot or crew he clearly is not liable."

In *Clancy v. Harrison* (1878) 4 Vict. L. R. 437, the Supreme Court of Victoria held that a master of a ship is not liable for injuries occasioned by the negligence of the crew. In the *Per Curiam* decision the court said:

"Conceding that there was evidence of negligence of anyone, the defendant is not answerable for the negligence of another fellow servant, even if the owners would have been liable; in any aspect there was no evidence to give to the jury."

To recapitulate: There are three cases in one state, New York, and one Federal District Court case holding a master liable under these circumstances. The authorities in Louisiana, England and Canada are *contra*. We think it may be properly said that the statements in the American texts as to the law on this subject are un-

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*It should be noted that cases involving the master's liability for damage to cargo where he has signed bills of lading as master and not as agent, are not in point. In such cases he makes himself personally liable in contract. See *Carver on Carriage of Goods by Sea*, Sec. 47.

warranted and we doubt whether there has ever been a *settled* rule on this question.

This court has never, so far as we can discover, passed on the question. Number 14 of this court's Rules in Admiralty provides:

> "In all suits for pilotage or damage by collision, the libelant may proceed *in rem* against the ship and/or *in personam* against the master and/or the owner."

It is our understanding that this is a rule of procedure not of liability; that is to say it is to be construed as allowing the master to be joined as party respondent with the ship and/or the shipowner. We do not understand that the rule is to be read as prescribing liability against the master for negligent acts of subordinate officers in which he had no participation.

III.

ASSUMING THAT THE RULE ONCE EXISTED THAT A SHIPMASTER IS LIABLE FOR THE NEGLIGENT ACTS OF HIS SUBORDINATES, THE REASON FOR SUCH HARSH DOCTRINE HAS CEASED TO EXIST AND THE RULE SHOULD NO LONGER BE APPLIED.

1. The considerations which may possibly have warranted the imposition of such liability are not present under modern conditions of ship operation.

It will be noted that the principal basis for Mr. Justice Story's statement was that masters are treated "as in some sort a subrogated principal and qualified owner of the ship, possessing authority in the nature of the exerci-

torial power for the time being". The conditions described by Story were no doubt true of shipping in ancient times and the rule of the Roman law and the ancient maritime codes to which he refers were appropriate to those conditions. But even in Mr. Justice Story's time it had been judicially recognized that ships were being operated under radically different arrangements. Thus in 1831 (Story's work was published in 1839) Judge Ware of the District Court of Maine in the case of

The Rebecca, 20 Fed. Cas. No. 11619,

had before him the question of whether a vessel was liable, in specie, to answer for the loss or damage, by the fault of the captain, of goods which were taken to be transported on freight. Judge Ware made an exhaustive search of the codes and ordannances of the maritime law regarding the relationship of the master of the vessel and its owners. In the course of his discussion he made the following observations directly pertinent to our problem:

> "The custom which exempted the owners from personal responsibility for the acts of the master, extended, as has been observed, as well to obligations arising ex contractu as ex delicto. No distinction was made between them, and on the principles upon which the custom stood in its origin and in the time of the Consulate of the Sea, there does not appear to be any just ground for a distinction. The master, who was, in point of fact, ordinarily, if not always, a part owner, was considered as the head and acting partner in a commercial enterprise, and not as the agent of the owners of the vessel, and merchants dealt with him and trusted him in that character. And this was the character which the maritime legislation and jurisprudence of the times attributed to him.

But since the age of the Consulate, a great revolution has taken place in the state of civil society, and the reasons of public policy, in which the custom originated, have, in a great measure, ceased to exist. In consequence of the increased facilities of communication between nations, the greater security of maritime commerce, the vast augmentation of commercial capital, and the elasticity and vigor communicated to maritime adventures by the invention of the contract of insurance, extensive commercial enterprises are brought within the means of individual capitalists, and the union of a number of fortunes has become unnecessary for the carrying on of commercial operations with safety and success, even upon a large scale. During the same period, a gradual and silent change has been operated in the relations of maritime commerce. *The character and authority of the master of a vessel has fallen from that of the chief and the acting and responsible head of a maritime adventure, to that of the stipendiary agent or praepositus of the owners of the vessel. This change in the character of the master, should naturally be followed by a corresponding change in his authority and liabilities.*

It is a rule of natural law, incorporated into every system of jurisprudence, that the contract of an agent, acting in the name of his principal, and within the limits of his authority, binds the principal, but does not, unless he exceeds his authority, bind himself. The contract of the agent is the contract of the principal, entered into through the medium and instrumentality of the agent. It is, therefore, directly binding upon him, as his own contract. It is also obligatory upon him on the principles of natural equity. He has the benefit of the contract, and in justice ought to bear its burden. But as the agent contracts in the name of another, and derives no personal advantage from the contract, there is no reason for holding him personally bound to fulfill its obligations.

> Looking upon the master of a vessel, therefore, as the simple agent of the owners, acting in their name and for their benefit, upon the plainest deductions of reason, as well as upon the principles of natural equity, his contracts, within the legitimate scope of his authority, ought to be personally binding on the owners, and, for the same reasons, they ought not to be personally obligatory upon himself. *A just application of principles to the altered relations of the master to the owners, will reverse the ancient custom as to their liabilities.*" (Italics ours.)

If the foregoing observations are true of conditions in 1831 how much more applicable they are to conditions today. It may be that in earlier times, when masters of vessels were almost always part owners; when a vessel would leave its home port to trade in all parts of the world for several years without return, that it was proper to hold the master personally responsible for the negligence of his inferiors. But times had changed by 1831. At that time it was recognized that the master had become only the stipendiary agent of the owners of the vessel.

Today it is a matter of common knowledge that he is rarely even that. The day of the tramp schooner is practically gone. As a general rule vessels have regular routes and regular ports of call. This was the situation of the Newport. Steamships are owned in the main by large corporations; port captains employ the officers; officers and clerks on shore supervise the receipt and discharge of cargo and pay the bills in connection therewith. The master today is little more than a navigator.

Judge Neterer of the District Court in Washington has recently commented on the changed situation of the master of a vessel in

Everett v. U. S., 277 Fed. 256.

This was an action by seamen against the master of the vessel on which they had signed articles. The form of articles which must be signed is prescribed by Section 4612, R. S.; Schedule, Table A. Under this form the master personally contracts to pay the seamen their wages. The court deprecated the statutory necessity for holding the master liable and expressed a strong opinion relative the injustice of the situation, saying:

> "Under the shipping articles the master is obligated to pay the wages of the seamen. This is an extreme hardship, brought on by no fault of the master. It is a liability which was not contemplated by either the master or the seamen. The master lost his earnings on the voyage, he could not even participate in the proceeds of sale of the vessel, and now to be adjudged liable for the unpaid wages of the seamen will take from him all his savings, and the provision made for the education of his children, and leave his family destitute, except such exemptions as are given by law to the head of a family. The form of article is provided by section 4612, R. S., 'Schedule' 'Table A' (Comp. St. Sec. 8392). This form was adopted when the relation of the master to the ship and to the owner was very different from that of the present time. The reasons for this stipulation, it would seem, do not obtain in the modern shipping world, and a change should be made, but it cannot be made by the court."

The District Court in the foregoing case was forced to hold as it did because the statute admitted of no other

decision. This court is under no such compulsion in the present instance. No statute is involved. The few authorities (none recent) which have passed on this question are in conflict. Even if it can be said that the decisions pronouncing the old harsh doctrine are preponderant, they do not issue from courts which would warrant this court in following them for any reasons of comity or the like. Nor have any rights in property become fixed which might justify the further promulgation of an unsound and cruel rule.

And if there ever was a valid reason for the doctrine announced by *Story* and *Denison v. Seymour* we submit that it is now non-existent. The day has long since gone by when, in the words of *Story,* a master of a vessel is "a sort of a subrogated principal and qualified owner of the ship". As a master is not an owner, or a "qualified owner", we submit that the principle of *respondeat superior* should not be applied to him.

It seems to us that it would be a very harsh doctrine that would hold the modern salaried shipmaster liable for tortious acts of the subordinate ship's officers where the master himself has not been negligent. It is plainly impossible for a shipmaster to be always on the bridge. If the ruling of the Circuit Court of Appeals is upheld every shipmaster is faced with the prospect of having his entire life's savings swept away by the negligent act of a subordinate while he is properly asleep in his cabin.

2. The reasons for the rule having ceased, the authorities applying it should not be followed. "Cessante ratione legis cessat ipsa lex."

Entirely apart from the authorities recognizing the changed status of a shipmaster, it is a matter of common knowledge that a master today is merely a principal servant of the owner of the vessel. No reason exists today (if it ever existed) for making his case an exception to the general rule of non-liability of intermediate servants.

> "It is a well settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim, *'cessante ratione, cessat ipsa lex.'* This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances."
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> *Beardsley v. Hartford,* 50 Conn. 529, 541.

We respectfully pray that this court review the judgment of the Circuit Court of Appeals deciding that your cross-petitioner, the master of the Newport, was properly held liable for the negligence of the third officer of that vessel.

Dated at San Francisco, California,
January 22, 1927.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Counsel for Cross-Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 744

PACIFIC MAIL STEAMSHIP COMPANY, a corporation, (Respondent, Claimant and Cross-Libelant),

STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. McKINNON, Master of said vessel,

Cross-Petitioners and Respondents,

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. PATTERSON, deceased, JAS. PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON (Libelants and Cross-Respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN MCDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND (Libelants),

Cross-Respondents and Petitioners.

Notice of Filing Cross Petition.

The cross-respondents in the above entitled cause and their proctors will please take notice that a cross petition for a writ of certiorari, together with the supporting brief, of which the foregoing are true and correct copies, were filed with the Clerk of the Supreme Court of the United States, at Washington, D. C., on the..... day of....., 1927.

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Proctors for Cross-Petitioners.

ADMISSION OF SERVICE.

Due service of the foregoing notice, and receipt of a copy of said notice together with a copy of the cross petition, printed record and supporting brief, is hereby admitted this.....day of.....,
1927, at San Francisco, California.

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.....,

Proctors for Cross-Respondents.